

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. CR-10-772 SC
)
Plaintiff,)
) ORDER DENYING DEFENDANT'S
v.) MOTION FOR ACQUITTAL AND/OR
) NEW TRIAL
GREGORY WALKER,)
)
Defendant.)

I. INTRODUCTION

A jury found Defendant Gregory Walker ("Defendant") guilty of possessing ammunition in violation of 18 U.S.C. § 922(g)(1). Now Defendant moves under Rules 29 and 33 of the Federal Rules of Criminal Procedure for a judgment of acquittal and/or new trial. ECF No. 67 ("Mot."). The government filed an Opposition; Defendant did not file a Reply. ECF Nos. 71 ("Opp'n"), 72 ("Reply"). A hearing on this motion was held on August 29, 2011. Having considered the papers submitted and the arguments made by both parties, the Court DENIES Defendant's Motion.

II. BACKGROUND

On June 3, 2010, a shoot-out occurred in the Western Addition neighborhood of San Francisco, near the intersection of Turk Street and Steiner Street. Defendant was subsequently arrested on suspicion of participating in this shoot-out, and on October 21,

1 2010, he was indicted on one count of violating 18 U.S.C. §
2 922(g)(1). ECF No. 1 ("Indictment"). Section 922(g)(1) prohibits
3 the possession of ammunition by individuals previously convicted of
4 a crime punishable by a term of imprisonment exceeding one year.

5 Prior to trial, Defendant filed a motion to exclude certain
6 identification evidence at trial. ECF No. 27. Defendant stated
7 that surveillance cameras in and around the nearby Laurel Gardens
8 housing project captured footage of the shoot-out. Id. Defendant
9 anticipated that the government would call as witnesses members of
10 the San Francisco Police Department's ("SFPD") Gang Task Force to
11 identify Defendant based on their review of the surveillance
12 footage. Id. at 16. Defendant argued that this evidence should be
13 excluded because it "improperly invades the province of the jury"
14 and was "inherently prejudicial" because it would lead the jury to
15 believe Defendant had prior contacts with the police. Id. The
16 government opposed Defendant's motion, arguing that under United
17 States v. Beck, 418 F.3d 1008, 1013 (9th Cir. 2005), such testimony
18 is admissible if it is rationally based and sufficiently helpful to
19 the jury. ECF No. 29 at 8. The government argued that
20 unidentified law enforcement officers had numerous prior contacts
21 with Defendant and were familiar with Defendant's appearance at the
22 time of the alleged incident. Id. at 8-9.

23 On June 20, 2011, the Court conducted an evidentiary hearing.
24 ECF No. 42. The government produced SFPD Officers Sean Griffin
25 ("Griffin") and David Do ("Do"), and both officers stated that they
26 could identify Defendant as the shooter in the surveillance footage
27 due to their numerous prior contacts with Defendant. Griffin
28 stated that he was assigned to the SFPD's Gang Task Force and that

1 he specialized in Western Addition gangs. Id. at 76:19-21. After
2 watching the video, Griffin identified Defendant as the shooter,
3 saying, "I know him personally." Id. at 79:11. Griffin testified
4 that he had had "dozens and dozens" of contacts with Defendant,
5 including multiple "documented contacts" -- i.e., contacts in which
6 police reports were generated. Id. at 79:13-24. These documented
7 contacts were discussed at great length. Id. at 79-85. Griffin
8 testified that due to these contacts, he was able to identify
9 Griffin in "one second" upon his first viewing of the video clip.
10 Id. at 87:4-6. Griffin also testified that he could identify the
11 individual near the shooter in the video as Defendant's brother,
12 Julius Hughes ("Hughes"). Id. at 87:8-12.

13 Do testified that in 2009, he was assigned to the SFPD's Gang
14 Task Force and was investigating gangs in the Western Addition.
15 Id. at 106:14-17. After viewing the surveillance footage, Do
16 identified Defendant as the shooter and Hughes as his companion on
17 the basis of "prior police contacts." Id. at 108:6-11. Do
18 testified that he had "approximately four to five" prior contacts
19 with Defendant, and discussed those prior contacts. Id. at 108:14-
20 110:10. On cross-examination, Do admitted that because he was
21 transferred from the Gang Task Force in November 2009, he could not
22 know whether Defendant had facial hair in June 2010, and that he
23 had reviewed booking photos of Defendant prior to viewing the
24 surveillance video. Id. at 115:25-117:9.

25 The Court denied Defendant's motion, finding that given the
26 officers' numerous prior contacts with Defendant and the quality of
27 those contacts, their testimony would be helpful to the jury. Id.
28 at 132:4-24. The Court ordered the parties to meet and confer to

1 discuss how best to "sanitize" the contacts so as to not unfairly
2 prejudice the jury and to alert the Court if no agreement could be
3 made. Id. at 134:1-10.

4 Trial commenced on June 27, 2011. Before opening statements
5 and outside the presence of the jury, the parties agreed that
6 Officers Griffin and Do would be identified as police officers, but
7 that they would not tell the jury they worked for the SFPD's Gang
8 Task Force. TR 13:17-14:15. During its case-in-chief, the
9 government introduced video footage from two surveillance cameras
10 in the Laurel Gardens housing project. Gov.'s Exs. 2 & 3. The
11 footage captured an individual in a black hooded sweatshirt firing
12 a gun across Turk Street. A second camera captured two seconds of
13 footage wherein the shooter's face is briefly visible.

14 The government called Officers Griffin and Do as witnesses.
15 Griffin testified that he had been a police officer for eleven
16 years and had multiple prior contacts with Defendant. TR 229:12-
17 20. Griffin testified that he arrived at Laurel Gardens during the
18 shooting on June 3, 2010, shortly after shots were fired. Id. at
19 230:12-25. Griffin identified the individual in the surveillance
20 footage as Defendant. Id. at 238:17-239:4. He testified that upon
21 seeing the video for the first time, it took him only a second to
22 identify Defendant based on his face and what he called his
23 "distinctive receding hairline." Id. at 239:15-20. Griffin
24 identified the other adult in the video footage as Hughes,
25 Defendant's half-brother. Id. at 238:17-239:4

26 Do testified that he had been a police officer for thirteen
27 years and that he knew Defendant from previous contacts. Id. at
28 289:12-17. Do also identified Defendant as the individual in the

1 surveillance video based on his facial features and distinctive
2 receding hairline, and he identified Hughes as the other adult in
3 the video footage. Id. at 293:3-8, 297:10-17.

4 The government also introduced into evidence two Sellier &
5 Bellot .40 caliber S&W shell casings found near the Laurel Gardens
6 parking lot, not far from the area where the shooter fired, and
7 several other bullets and casings found in the area the night of
8 the shooting.

9 After deliberation, the jury returned a guilty verdict on the
10 single count of violation of 18 U.S.C. § 922(g)(1).
11

12 **III. LEGAL STANDARD**

13 **A. Motion for Judgment of Acquittal**

14 Under Rule 29 of the Federal Rules of Criminal Procedure, a
15 court must enter judgment of acquittal if the evidence, viewed in
16 the light most favorable to the government, would not permit any
17 rational trier of fact to conclude that the defendant was guilty
18 beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-
19 19 (1979). The court must deny the motion if it determines that
20 "at the time of the motion there was relevant evidence from which
21 the jury could reasonably find [the defendant] guilty beyond a
22 reasonable doubt, viewing the evidence in light favorable to the
23 Government." United States v. Figueroa-Paz, 468 F.2d 1055, 1058
24 (9th Cir. 1972).

25 **B. Motion for New Trial**

26 Under Rule 33 of the Federal Rules of Criminal Procedure, "the
27 court may vacate any judgment and grant a new trial if the interest
28 of justice so requires." Fed. R. Crim. P. 33(a). The Ninth

1 Circuit has held that a motion for a new trial should be granted
2 only in "exceptional circumstances in which the evidence weighs
3 heavily against the verdict." United States v. Hsieh Hui Mei Chen,
4 754 F.2d 817, 821 (9th Cir. 1985).

5
6 **IV. DISCUSSION**

7 **A. Motion for Judgment of Acquittal**

8 To prove a violation of 18 U.S.C. § 922(g)(1), the government
9 must establish that a defendant knowingly possessed ammunition, the
10 ammunition had been transported from one state to another or
11 between a foreign nation and the United States, and at the time the
12 defendant possessed the ammunition, the defendant had been
13 convicted of a crime punishable by imprisonment for a term
14 exceeding one year. United States v. Montero-Camargo, 177 F.3d
15 1118, 1120, amended on other grounds by 183 F.3d 1172 (9th Cir.
16 1999).

17 Defendant argues that there was insufficient evidence for a
18 rational jury to conclude that Defendant was guilty of violating 18
19 U.S.C. § 922(g)(1) beyond a reasonable doubt. Mot. at 6-8.
20 Specifically, Defendant argues that the only evidence of "identity"
21 -- that is, that Defendant was the shooter in the surveillance
22 video -- was the surveillance videos and the testimony of Griffin
23 and Do. Id. Defendant argues that the surveillance video "does
24 not sufficiently show the facial features of the subject to allow
25 anyone to make a positive identification." Id. at 7. Defendant
26 argues that even slowing the video down frame-by-frame does not
27 make a clear identification possible "because the surveillance
28 video is just not clear enough." Id. Defendant argues that there

1 was no evidence introduced at trial which corroborated the
2 identification by Griffin and Do. Id. at 7-8.

3 The government responds that "[t]he law does not require
4 corroboration for the jury to deem their testimony credible,"
5 arguing that in the Ninth Circuit, "the jury is the exclusive
6 arbiter of witness credibility." Opp'n at 4 (citing United States
7 v. Nelson, 419 F.2d 1237, 1242 (9th Cir. 1969) and United States v.
8 Rojas, 554 F.2d 938, 943 (9th Cir. 1977)). The government argues
9 that even though no corroborating evidence is required, there was
10 corroborating evidence, as the government offered evidence that the
11 other individual in the video was Defendant's brother, that Griffin
12 had seen Defendant with his brother in the past, and that
13 Defendant's brother's mother-in-law lived in Laurel Gardens. Opp'n
14 at 4.

15 The Court agrees with the government. The evidence at trial
16 was sufficient for a rational jury to conclude that the Defendant
17 was the shooter. Accordingly, it DENIES Defendant's Motion.

18 **B. Motion for New Trial**

19 Defendant argues that he is entitled to a new trial because
20 the testimony of Griffin and Do "improperly invaded the province of
21 the jury." Mot. at 10. Defendant argues that this testimony
22 constituted lay witness testimony that failed to satisfy Rule 701
23 of the Federal Rules of Evidence and thus violated his rights under
24 the Due Process Clause. Id.

25 Rule 701 states that a lay witness's testimony "in the form of
26 opinions or inferences is limited to those opinions or inferences
27 which are (a) rationally based on the perception of the witness,
28 and (b) helpful to a clear understanding of the witness' testimony

1 or the determination of a fact in issue, and (c) not based on
2 scientific, technical, or other specialized knowledge within the
3 scope of Rule 702." Fed. R. Evid. 701. Here, both Griffin and Do
4 testified that due to numerous prior contacts with Defendant, they
5 were able to identify Defendant as the shooter in the surveillance
6 videos. The surveillance video was not clear enough to render this
7 testimony superfluous to the jury; nor was it so unclear as to
8 render the witnesses' identification of Defendant from it not
9 rationally based on their perception. As such, the Court rejects
10 Defendant's argument that admission of Griffin's and Do's testimony
11 violated his rights under the Due Process Clause.

12 Defendant also argues that the admission of Griffin's and Do's
13 testimony violated his rights under the Confrontation Clause. Mot.
14 at 11. The Confrontation Clause protects the criminal defendant's
15 right to cross-examine witnesses who testify against him. Davis v.
16 Alaska, 415 U.S. 308, 315 (1974). Defendant does not argue that he
17 was denied the opportunity to cross-examine Griffin and Do; rather,
18 he alleges that this cross-examination was ineffective because
19 Defendant "could not explore the possible motives these two gang
20 task force officers might harbor in positively identifying him . .
21 . without revealing the damaging fact that they believed him to be
22 a gang member and that the shooting was gang related." Id. at 11.

23 The government responds that Defendant had the opportunity to
24 cross-examine both Griffin and Do and ask both witnesses about the
25 nature of their alleged prior contacts with Defendant, including
26 asking about "the time of day of the contacts, the frequency of the
27 contacts, the lighting, the distance that the officers were from
28 the defendant when they saw him, and their recollection about his

specific features." Opp'n at 10. The government argues that Defendant's decision to not elicit questions about the officers' role with SFPD's Gang Task Force was "a matter of strategy." Id.

The Court agrees with the government. Defendant had the opportunity to cross-examine Griffin and Do. He made the choice to avoid questioning that could have led to a discussion of Defendant's suspected gang involvement. He had the opportunity to discuss "sanitization" of the witnesses with the government and alert the Court prior to trial if no agreement could be reached. As such, he was not denied his rights under the Confrontation Clause.

V. CONCLUSION

For the foregoing reasons, the Court DENIES the motion of Defendant Gregory Walker for a judgment of acquittal and a new trial.

IT IS SO ORDERED.

Dated: September 2, 2011


UNITED STATES DISTRICT JUDGE